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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

In Re Bard IVC Filters Products
Liability Litigation

No. MD-15-02641-PHX-DGC

**PLAINTIFFS' REPONSE AND
OBJECTION TO DEFENDANTS'
"RESPONSE" IN OPPOSITION TO
PLAINTIFF'S NOTICE RE
BELLWETHER CASES**

Plaintiffs respond and object to Bard's Response in Opposition to Plaintiff's Notice
Re Bellwether Cases [Doc. 11640] ("Response").

I. Background

On June 13, 2018, this Court ordered that by 3:00 p.m. on June 22, 2018, the parties "shall file a short notice on the docket indicating if plaintiff Mulkey will be able to proceed to trial in September." [Doc. 11549.] The Court further stated that "[i]f her ability to proceed with trial in September is uncertain, the Court will review existing briefing and issue a decision [the] week of June 25, 2018 on another plaintiff for the September bellwether trial." *Id.* (emphasis added). The Court further requested the parties to propose a schedule for addressing the *Cisson* argument if plaintiff Mulkey is replaced. *Id.*

On June 21, 2018, Plaintiffs filed a notice explaining Ms. Mulkey's health status and that her availability for the September trial date was uncertain. [Doc. 11639.]

1 Plaintiffs did not advocate for or suggest a case to replace *Mulkey* as the third bellwether
2 trial. Pursuant to this Court's June 13 Order, Plaintiffs further indicated that they did not
3 intend to re-urge the *Cisson* motion for the third bellwether trial subject to the Court's
4 prior rulings.

5 The following day, Bard filed a "Response" to that notice. Despite this Court's
6 statement in its June 13 Order that it would decide the replacement bellwether case for
7 *Mulkey* based on "existing briefing," Bard took another bite at the apple – further
8 advocating that the Court select *Kruse*, supplementing the argument it made in its June 15,
9 2018, memorandum. Bard also requested to re-urge its motion in *limine* regarding the
10 admissibility of Recovery Filter migration death evidence. *Id.*

11 **II. Argument**

12 Plaintiffs object to Bard's "Response" as unauthorized and beyond the scope of the
13 Court's Order and Plaintiffs' Notice. Plaintiffs' Notice provided solely the information
14 the Court requested in its June 13 Order: Ms. Mulkey's ability to proceed with trial in
15 September and, given her uncertainty, Plaintiffs' position that they would not be re-urging
16 the *Cisson* argument regardless of which case the Court selects for bellwether 3. After
17 conceding that *Mulkey* should not proceed in September, Bard's Response argued
18 regarding the Court's selection of the replacement bellwether trial. Not only did that
19 argument exceed the scope of this Court's June 13 Order, which indicated the Court
20 would decide the replacement bellwether case based on the "existing briefing," it violated
21 this Court's CMO 33, which ordered the parties to submit by June 15, 2018, simultaneous
22 memoranda as to the order of bellwether trials and selection of the sixth bellwether trial
23 [Doc. 11320].

24 Plaintiffs cannot "unring the bell" of Bard's filing and thus request that they be
25 permitted to respond to Bard's arguments in the "Response" as follows:
26
27
28

1 A. This Court Should Ignore Bard’s Argument to Select Kruse as the Third
 2 Bellwether Trial Because It Is a “Non-Fracture” Case.

3 Bard argues in its Response that the Court should select *Kruse* as the third
 4 bellwether trial, contending it is a “non-fracture” case. But, the parties (including Bard)
 5 stipulated to Plaintiff Mulkey’s case serving as the third bellwether knowing that it
 6 involves a fracture. Thus, Bard clearly did not regard the fact of fracture in *Mulkey* as
 7 being somehow disqualifying until the loss of her ability to proceed to trial in September.

8 Indeed, while Bard purports to seek “balance” by its nomination of *Kruse*, its own
 9 selection of proposed bellwether cases skews heavily in favor of fracture cases. Of the
 10 five cases for which it advocated in its proposed bellwether filing, four involve fractures:
 11 *Jones*, *Mulkey*, *Nelson*, and *Hyde*. Only *Kruse* did not involve a fracture.¹

12 Thus, this Court should select *Hyde* as the next bellwether trial for the reasons set
 13 forth in Plaintiffs’ June 15, 2018, submission.

14 B. This Court Should Disregard Bard’s Request to Re-Urge Exclusion of
 15 Recovery Cephalad Migration Deaths.

16 This Court’s June 13 Order was clear as to the subject matter of the parties’ June
 17 22 filing: (1) the status of Ms. Mulkey’s health and her ability to participate in trial in
 18 September, and (2) briefing on any *Cisson* argument for a replacement bellwether trial.
 19 Despite that, Bard’s Response requests to re-urge for a third time its motion to exclude
 20 cephalad migration evidence. As such, Bard’s request is improper.

21 Additionally, Plaintiffs note that both *Hyde* and *Kruse* involve G2 filters (*Hyde* a
 22 G2x, and *Kruse* a G2). In *Booker*, this Court has decided the admissibility of Recovery
 23 cephalad migration deaths multiple times in the context of claims relating to a G2 device.
 24 Thus, there is no need to address this issue again with respect to G2 devices, and the Court
 25 should deny Bard’s request to revisit its ruling regardless of which case it selects to
 26 replace *Mulkey* as the next bellwether trial.

27 ¹ In its recent filing, Bard advocated for the *King* case as the sixth bellwether, but as noted
 28 in Plaintiffs’ June 15 filing, this Court found and Bard previously conceded that *King* is
 not appropriate for a bellwether.

C. It is Not Premature to Move *Mulkey* to the Fifth Bellwether Slot (the Trial Beginning in Early 2019).

The parties have briefed their positions on the next two cases to be tried, and those are *Hyde* and *Kruse*. Given the uncertainty about Ms. Mulkey's ability to attend trial in September 2018, and the fact that a diagnosis will not even be reached for over a month, it only makes sense to move *Mulkey* to the fifth bellwether trial to avoid any potential delay in preparing for the fourth bellwether (the bellwether in November 2018). In fact, counsel for plaintiff (and likely the defense) will begin planning and preparing for the fourth bellwether now, as it is only four months away. There is simply no reason to risk being back in the same position with the *Mulkey* case in November.

RESPECTFULLY SUBMITTED this 27th day of June 2018.

GALLAGHER & KENNEDY, P.A.

By: /s/ Mark S. O'Connor

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of June 2018, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing.

/s/ Jessica Gallentine